Commission envisioned, these services are being offered by carriers and unaffiliated entities alike to enhance the mix of competitors, all of whom can innovate, improve service quality, and better serve consumers.

The advanced information services that are now available to the American consumer provide a wealth of benefits. For instance, Internet services help eliminate geographic barriers to information,[72] education,[73] health care[74] and commerce.[75] Information service applications and features have spawned new ways of interacting, whether through "follow me" messaging, the unique types of personalized "Instant Messaging" or remote processing of information.[76] In short, as Congress emphasized in the 1996 Act, "[T]he rapidly developing array of Internet and other computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens . . . [and] offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[77]

Just as consumer choice and diversity in narrowband has been an undisputed success in stimulating consumer interest in and demand for Internet services, so too will consumer choice and diversity drive broadband demand and encourage innovation. While there are many

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frames" (LCD screen) that can, for example, be given to relatives so that when the computer "calls" (it plugs into a phone line), updated pictures of the grandchildren (or others) will be provided.

[72] *See* Federal Communications Commission Chairman Michael K. Powell, Remarks at the Broadband Technology Summit, U.S. Chamber of Commerce (Apr. 30, 2002) at 1-2.

[73] *See, e.g.,* U.S. Department of Commerce, Economics and Statistics Administration, Digital Economy 2002, Feb. 2002 at 15-17 ("Digital Economy 2002") (discussing an MIT initiative that "will offer anyone with Internet access, anywhere in the world, the opportunity to obtain the basics of a world-class education").

[74] *Universal Service Order,* 12 FCC Rcd at 9106 ¶ 630.

[75] *See* Digital Economy 2002 at 13-14.

[76] *See, e.g.,* Leslie Miller, *Innovations Abound at Internet World,* USA Today, Jan. 26, 1999, *available at* http://www.usatoday.com/life/cyber/tech/ctb784.html (describing AOL-pioneered innovations such as instant message and buddy list features).

[77] 47 U.S.C. § 230(1), (3) (1996).

arguments advanced as to whether and why broadband is "broken,"[78] there is general agreement that it is ultimately consumer demand that will drive greater broadband adoption.[79] While AOL Time Warner does not purport to have all the answers to these complex questions, it continues to believe that by offering consumers a choice of and diversity in service offerings, not only in service quality but in content and innovative features and applications, consumer acceptance of broadband will increase.[80] Given that consumers are not one-size-fits all, it is only logical that a one-size-fits-all approach to service offerings will not optimize consumer welfare. Since it is ISPs that bring broadband to consumers, a diversity of ISPs is the best way to ensure that there are a plethora of service choices, with each ISP seeking its own niche, catering and marketing to the tastes, desires and needs of consumers.[81]

Lastly, it is important to bear in mind that these successful rules and policies have benefited not only consumers, but carriers as well. Despite the recent general downturn in the telecommunications sector, the evidence underscores that wireline carrier data services revenues remain healthy.[82]

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[78] *See, e.g.*, U.S. Department of Commerce Assistant Secretary Nancy Victory, Keynote Address at the Alliance for Public Technology Broadband Symposium (Feb. 8, 2002); Federal Communications Commission Chairman Michael K. Powell, Remarks at the National Summit on Broadband Deployment (Oct. 25, 2001).

[79] *See, e.g.*, Federal Communications Commission Chairman Michael K. Powell, Remarks at the Broadband Technology Summit, U.S. Chamber of Commerce (Apr. 30, 2002); "SBC DSL Internet Update," Feb. 2002, http://www.sbc.com/Products_Services/981954revisedupdate.3.22.pdf (citing Gartner Dataquest study stating "demand for high-speed Internet has never been better," and providing graphic showing degree to which "Broadband Expected to Grow"); Verizon 2001 Annual Report at 13, http://investor.verizon.com/annual/01VZ_AR.pdf ("Our network access revenues grew $237 million, or 1.8%, in 2001 and $315 million, or 2.5%, in 2000. This growth was mainly attributable to higher customer demand, primarily for special access services (including DSL)").

[80] Further, there is no demonstrated correlation between the elimination of the Commission's *Computer Inquiry* precedent and related obligations and an increase in facilities-based broadband deployment.

[81] *See* Reply Comments of AOL Time Warner in CC Docket No. 01-337, at 6 (filed Apr. 22, 2002).

[82] *See e.g.*, "BellSouth Reports First Quarter Earnings," Apr. 19, 2002, http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=40063 (reporting that in first quarter 2002 data revenues grew nearly 15 percent); Qwest 2001 Annual Report at 45, http://www.qwest.com/about/investor (reporting that 2001 revenues increased due to greater commercial services revenues driven by IP and data services and increased optical capacity asset sales; moreover, the data and IP services grew by almost 54% in 2001 from 2000, and DSL customers grew by almost 74% over 2000); "SBC Reaffirms 2002 Outlook, Updates Growth and

B. The FCC Should Update And Streamline Rules Implementing Core Access Rights For Information Service Providers

As described above, unfettered growth of information services has occurred through the Commission's regulatory efforts ensuring that wireline carriers act as common carriers between end users and information/applications providers. [83] No provider is excluded from the information and applications business, from the smallest developers to the largest wireline carriers. Nor does the regulatory scheme leave any carrier uncompensated or with an uneconomic return for engaging as a common carrier;[84] price cap and other regulation provide additional incentives for carriers to innovate and yield higher returns. A critical component of this regulatory scheme has always been to ensure that wireline carriers not discriminate against information service competitors and engage in other anticompetitive conduct, which may otherwise be in the carriers' self-interests.

When assessing broadband transmission, the Commission should build upon the fundamental successes of the past and adopt rules to ensure that broadband carriage delivers an abundant variety and diversity of information/applications to the American public. This means

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Expense Management Opportunities," Mar. 7, 2002 http://www.sbc.com/press_room/1,5932,31,00.html?query=20020307-1 (reporting that SBC reaffirmed its full-year 2002 revenue growth target of one percent to three percent, and targeted having more than two million DSL Internet access service subscribers at year-end 2002, which is a more than 50 percent year-over-year increase; "[r]esidential customer service levels across SBC never have been better"); "SBC DSL Internet Update," Feb. 2002, http://www.sbc.com/Products_Services/981954revisedupdate.3.22.pdf (providing graphic showing that SBC has increased its DSL subscriber base from 3,000 customers in 1998 to more than 1.3 million customers today); Verizon 2001 Annual Report at 6-7, http:// investor.verizon.com/annual/01VZ_AR.pdf ("Revenues were $67.2 billion, up 4.1 percent, driven by increased sales in wireless, long distance, data and high-speed Internet access. . . . We also ended the year with 1.2 million customers for our high-speed Internet access service, DSL – a 122 percent increase over 2000 . . . Data revenues were $7 billion. Transport revenues were up 21.2 percent despite the weak economy").

[83] *See* Computer III, 104 FCC 2d at 1037 ¶¶ 149-50; OPP Working Paper No. 31 at 5-6, 10-11.

[84] Indeed, in the 1990's, many Bell Operating Companies gained substantial revenues through the sale of second lines from demand for Internet access. *See* Lee L. Selwyn and Joseph W. Laszlo, as prepared for the Internet Access Coalition, The Effect of Internet Use on the Nation's Telephone Network, Jan. 22, 1997 at 3-4. Today, these same companies highlight their growth of DSL lines, and declining costs of service, as current economic drivers. SBC Investor Briefing at 5 (Jan. 24, 2002) ("SBC's DSL operations have a "strengthened cost profile" and "[s]ince the beginning of 2001, SBC's recurring revenues per DSL Internet subscriber are up 30 percent, and total acquisition costs per gross add are down more than 35 percent").

that regulation must continue to embrace the principle that the wireline carrier acts as a carrier for all, including providers with competing high-speed information services. If it so chooses, the carrier may offer its own high-speed information and applications in competition. Failure to do so – by either ignoring outmoded regulation or by taking steps away from information service competition – runs the risk that the FCC will both over-regulate and under-regulate. If the rules of access are outdated, they will not and cannot work to promote the public's interest and ensure information services competition while, at the same time, they might impose a burden on wireline carriers with no offsetting benefit.

As such, the Commission should advance and update current regulations for application to broadband services so as to keep for the American public the promise of access to thousands of high-speed applications and sources of information, many of which are yet to come. All evidence indicates there is a continuing and strong need to ensure that wireline carriers do not act in an anticompetitive and/or discriminatory manner as the deployment of broadband continues. The FCC's 2001 *Computer III Refresh* proceeding,[85] for example, developed a record on carrier compliance with existing requirements that mandate nondiscrimination for ISPs using wireline carrier DSL transmission services.[86] There, the many information service providers offered compelling comments and evidence alleging carrier noncompliance, discrimination, and other anticompetitive conduct.[87] Moreover, there is an ongoing concern these practices – which were

[85] "Further Comment Requested to Update and Refresh Record On Computer III Requirements," Public Notice, CC Dkt. Nos. 95-20, 98-10, DA 01-620, 16 FCC Rcd 5363 (Comm. Car. Bur., March 7, 2001) ("*Computer III Refresh*").

[86] The Commission has explained fully that *Computer Inquiry* obligations attach to the BOCs' provision of xDSL services. *Advanced Services MO&O*, 13 FCC Rcd 24011 at ¶ 37.

[87] Comments of American ISP Association, CC Dkt. Nos. 95-20, 98-10 at 6 – 12 (April 16, 2001); Reply Comments of California ISP Association, Declaration of Lisa Bickford CC Dkt. Nos. 95-20, 98-10 at 6 – 12 (April 16, 2001).

the genesis of Title II regulation – have persisted, with allegations of continuing discrimination against independent information service providers.[88]

Over the years, as the FCC has faced the challenges of responding to litigation and the numerous court remands, layers of complexity have been added to the FCC's rules,[89] especially as the FCC has been required to piece together various components of its regulatory structures.[90] This regulatory complexity has some times been unwieldy, perhaps causing some of the BOCs to conclude that the rules are mere "paper" formalities; Verizon, for example, recently asserted that *Computer III* CEI plans "consist[] largely of boiler plate language that is common to nearly all such plans."[91]

This proceeding provides the Commission with the opportunity to take into account the critical policy objectives it has so successfully pursued to date, while at the same time reducing or eliminating wireline carrier regulations that do not effectively or efficiently advance these critical policy objectives. Specifically, AOL Time Warner believes that the FCC's rules should be narrowly tailored to effectuate two basic tenets as the pillars of its regulation: (1) non-discriminatory access to underlying transmission services at just and reasonable rates, terms and conditions; and (2) effective and swift enforcement.

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[88] *See, e.g., California ISP Association v. Pacific Bell and SBC-ASI*, California PUC Case No. 01-07-027, Ruling Denying Defendants' Motion to Dismiss (rel. March 28, 2002) ("*CISPA Order*") (California PUC to consider case brought by ISP trade association against SBC regarding DSL provisioning practices under California utility and anti-discrimination laws).

[89] In 1990, for example, the Ninth Circuit vacated three *Computer III* orders on the basis that nonstructural safeguards had not been adequately justified. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*"). Further proceedings were subsequently affirmed in *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"). In 1994, however, the court vacated and remanded to the Commission certain approvals of BOC ONA plans on the basis that they failed to meet "fundamental unbundling" of *Computer III*. *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

[90] Following the 1994 *California III* remand, for example, the FCC granted the BOCs a "temporary" waiver in 1995 to operate under *Computer III* CEI and ONA obligations, and not *Computer II* structural separation. That "temporary" waiver remains in place today, seven years later.

[91] Comments of Verizon, CC Dkt. Nos. 95-20, 98-10 at 13 (April 16, 2001).

The principle of non-discriminatory access – time-tested in narrowband – has a necessary and continuing role in the wireline broadband market. Indeed, the ongoing and rapid deployment of advanced services by unaffiliated ISPs and wireline carriers demands that, if the Commission is to alter rules in mid-stream, then those changes must be explicit and tailored. While it is true that the incumbent wireline carriers have had the burden of compliance with rules developed in the narrowband context, it is equally true that unaffiliated ISPs have heavily invested for decades in legitimate reliance upon continuing and efficient nondiscriminatory access to wireline carrier transmission, including broadband transmission. The Commission should not leave either wireline carriers or ISPs without explicit rules upon which to plan, or leave the American public with a less diverse set of high-speed information service providers. The information services industry and the American public would suffer acutely, however, if the Commission were to abandon efficient and specific access rules to wireline broadband services.

Thus, the Commission cannot simply rely on *ad hoc* enforcement of the general provisions of the Communications Act. As the FCC has emphasized, ISPs are not carriers that may choose to exercise Section 251 access rights. Further, while Sections 201 and 202 of the Communications Act are beneficial to address the entire range of practices that could arise, these statutory provisions are not sufficiently specific to compel particular courses of action in the carrier-ISP relationship. In contrast to these general provisions, FCC precedent establishes a bright-line "equal access" standard whereby it requires:

> the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics . . . *equal to* those provided to the carrier's enhanced services.[92]

[92] Computer III, 104 F.C.C. 2d at 1036, ¶ 147 (emphasis added). Indeed, the FCC expressly noted that this "equal access" standard is "simpler to enforce" than more general standards, which bring "a significant potential for discrimination . . . because of their intrinsic discretionary nature." Computer III, 104 F.C.C. 2d at 1037, ¶ 150.

Thus, if the FCC truly seeks to create a self-enforcing system, it must devise and adopt particular requirements that attain particular results so that ISPs can spend their resources serving consumers rather than pursuing regulatory and legal confrontations.

1. Non-Discriminatory Access To Underlying Transmission Services At Just And Reasonable Rates, Terms And Conditions

Most importantly, these streamlined rules of access should be built upon the principle that wireline carriers must offer non-discriminatory access to underlying transmission services at just and reasonable rates, terms and conditions. To effectuate this tenet, the FCC should ensure that access is afforded on a transparent basis, whether through filed tariffs or some other publicly available basis. Moreover, access must encompass the concept that a carrier cannot discriminate in service throughputs, speed or functionality such as when carriers seek to reserve the ability to provide "multiple applications" that could effectively degrade ISP service.[93] Further, service conditions and restrictions must be functionally or technically relevant to legitimate interests of the carriers; additional transport arrangements, however, that have no relation to the carrier's operations should be precluded. This follows as an outgrowth of the existing *Computer II/III* obligations to offer underlying transmission on a common carrier basis to all ISPs, [94] to minimize ISP transport costs, and to offer transparent technical characteristics of service for the carrier and unaffiliated ISPs.[95] Notably, if these obligations are properly clarified, the Commission could consider elimination of annual, semi-annual, and quarterly ONA reports regarding the availability of ONA services, especially if the CEI plans accurately depict on the carrier's web

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[93] SBC recently attempted to alter its DSL services in a manner that would have provided ISPs with no assurance of through-put speeds whatsoever, at the same time as it would have allowed SBC to sell other services to the ISPs' customers. Several ISPs complained to the FCC and SBC has, at least at this time, decided defer its current plans to alter the technical characteristics of its DSL service in this manner. *See* EarthLink Sep. 17, 2001 Letter.

[94] Computer III, 104 F.C.C. 2d at 1040, ¶¶ 158-159.

[95] Computer III, 104 F.C.C. 2d at 1041, ¶ 160.

sites what services are used by affiliated ISPs and how those services may be obtained by unaffiliated ISPs.[96]

Further, the FCC should require that access to transmission incorporate the means to place orders and provision services; in effect, efficient and nondiscriminatory OSS should be available to ISPs purchasing the carrier's broadband telecommunications service. In today's broadband environment of wholesale DSL transport, it is essential that the ordering process between the ISP service representatives and the incumbent carriers' wholesale DSL operations be supported with a fully mechanized and efficient OSS. The ordering of thousands of customer DSL requests per day cannot be left to manual or discretionary processes of the incumbent carriers, particularly since it is the American public that ultimately suffers by waiting too long for initial DSL service or repair. This OSS obligation should include the pre-ordering, ordering, provisioning, and maintenance/repair phases of the ordering process, as well as ensure that unaffiliated ISPs have access to the same databases of information that are available to affiliated ISPs. The Commission, of course, has previously recognized OSS as an important feature for competing ISPs and has required incumbent LECs to offer OSS on an unbundled basis in their ONA plans.[97] If this obligation is properly clarified, the Commission could consider streamlining the ONA process by taking OSS out of the details of ONA plans, and also relieving

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[96] AOL Time Warner notes that the BOCs' compliance with CEI plan obligations has been poor, with CEI plans that do not describe the services available. The plain meaning of the obligation, however, is that BOCs must post web-based information on the services used by its affiliates and describe, in a clear manner, how unaffiliated ISPs can obtain access to those same services. *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 & 98-10, Order, 14 FCC Rcd 21628 at ¶¶ 5-6 (1999).

[97] See, e.g., *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 6 FCC Rcd. 7646, 7667 (¶ 45) (1991) ("continuing development of OSS capabilities [by the Bell Operating Companies ('BOCs')] appears to be quite important to the kinds of services [enhanced service providers ('ESPs')] can provide...."); Memorandum Opinion and Order, 5 FCC Rcd. 3103, 3108, ¶ 38 (1990) (same); Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3087, ¶ 26 (1990) (OSS functions such as "service order entry and status" and others are "useful to ESPs" and are basic services subject to open network architecture ("ONA") obligations), *aff'd*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

the incumbent LECs of the obligation to report annually on the status of their progress towards ONA implementation.[98]

Finally, just, reasonable, and non-discriminatory rates should be reaffirmed by the Commission as a pre-requisite of any wireline carrier's participation in the high-speed Internet access market. Once again, this is a cornerstone of existing access rules,[99] as well as a requirement of Section 202(a) of the Communications Act.[100] It should continue in the broadband context. As the Commission has noted, transparent and public non-discriminatory rates are "a means of preventing improper cost-shifting to regulated markets and anticompetitive pricing in unregulated markets."[101] If the Commission decides to impose no pre-effective review of rates,[102] then the rates for DSL transmission services should be established on a cost-basis, with any rate changes made in a non-discriminatory fashion.

This basic tenet of broadband access could substantially supplant the current regime, which now consists of multiple rules adopted over an extended period in which broadband was not under consideration. Thus, for example, incumbent LECs would not be required to include broadband elements or services within their various ONA reports or ONA plan or to demonstrate compliance with the specific nine CEI parameters of *Computer III*.[103] Streamlining the rules in

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[98] *See Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, 6 FCC Rcd 7646, 7677-78, App. B (1991).

[99] Computer III, 104 F.C.C. 2d at 1040, ¶ 159 (BOC is required to tariff and resell basic services to affiliated ISP).

[100] *See* Reply Comments of AOL Time Warner in CC Docket No. 01-337, at 12 (filed Apr. 22, 2002). *See also Petition of New York State Public Service Commission to Extend Rate Regulation*, Report and Order, 10 FCC Rcd 8187, 8190, ¶ 17 (1995) (reaffirming that the measure of reasonableness under Section 201 should be found in "rates that reflect or emulate competitive market operations).

[101] Computer III, 104 F.C.C> 2d at 1040, ¶ 159.

[102] In a related proceeding, the Commission has sought comment on modification or elimination of the rules for incumbent LECs to file tariffs 15-days prior to the effective date of the service. Dominant/Non-Dominant NPRM at ¶ 36.

[103] Computer III, 104 F.C.C. 2d at 1039-1043, ¶¶ 159-167.

this way would achieve the Commission's objective of preserving and promoting competition while allowing wireline carriers to act in a minimally regulated environment.[104]

2. Effective and Swift Enforcement Should Be A Regulatory Cornerstone

Even more importantly, a major drawback of the current *Computer II/III* framework has been the burdensome and uncertain process of enforcement of those rules. Partly, this is a consequence of the fact that the rules themselves are not widely understood, have not been implemented by the carrier industry itself, and are subject to interpretation and dispute as applied in the broadband context. As the FCC streamlines its regulations, it must also ensure that parties can enforce those access obligations swiftly and efficiently. As such, the Commission should consider revamping the enforcement process as it streamlines its rules, with an acknowledgement that incumbent carriers are typically in sole possession of vital evidence needed to resolve disputes and that the time commitment involved with lengthy litigation is inconsistent with the rapidly-changing business environment in which information services are developed and offered.

The Commission should consider, for example, establishment of an enforcement process that is specific to resolving ISP-related issues. Such a process could include "last offer" mediation, whereby the parties put their disputes before the FCC staff and have incentives to present reasonable solutions averting the need for full-blown litigation. In addition, the parties could be required to submit confidential but specific information, such as the production of records regarding costs, pricing, OSS, provisioning and repair, for the ISP at issue as well as the affiliated ISPs. Further, under certain circumstances, the Commission's process should shift the

[104] NPRM at ¶¶ 47-51.

burden on the carrier where it is in sole possession of much of the key information, to produce evidence and to demonstrate that it has affirmatively complied with FCC rules.[105]

The FCC should also establish performance metrics for services that are today offered at wholesale, including OSS metrics, as the Commission has already proposed in the *Special Access Performance NPRM.*[106] In this respect, the Commission should also precisely define such terms as "order" and "provisioning intervals" in a uniform manner, since it has already encountered unusual and self-serving carrier definitions designed to minimize extensive and discriminatory carrier delays.[107] Indeed, performance metrics are a key area that is lacking currently because, while the nine *Computer III* CEI parameters are quite specific in some ways, they leave essential showings of reasonableness and determinations of carrier conduct to *ad hoc* decisions without much-needed objective criteria. Further, a set of performance metrics would not be difficult to establish or to report on, since the carriers are already providing the services and presumably are producing intervals data for their own internal records. Moreover, in terms of the process and definitional issues, the Commission could refer to UNE interval performance data, such as the time to provision line-sharing or criteria used for CLEC OSS.[108] At a

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[105] *In the Matter of McLeodUSA Publishing Co. v. Wood County Telephone Co.*, Memorandum Opinion and Order, File No. 01-MD-004, FCC 02-86, n. 36 (rel. March 28, 2002) (Commission explains that in some cases "the party with unique access to crucial information may have to bear the burden of proof").

[106] *See Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

[107] *See, e.g., Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539, at ¶ 136 (1997).

[108] *See e.g., Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, at ¶ 27 n.40 (2001) (citing *Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies*, Order Adopting Revisions to Inter-Carrier Service Quality Guidelines, NYPSC Case 97-C-0139 (December 15, 2000); *New York State Carrier-to-Carrier Guidelines Performance Standards and Reports*, NYPSC Case 97-C-0139 (Jan. 2001); *Texas Performance Remedy Plan and Performance Measurement, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001)).

minimum, the carrier in an enforcement process would be required to demonstrate that it is in full compliance with non-discriminatory access for unaffiliated ISPs.

To enhance competition, minimize exposure for wireline carriers and provide certainty for all parties, the Commission could also establish a "safe harbor" making clear that certain arrangements between incumbent carriers and ISPs will be deemed in conformity with the FCC's rules. Such a "safe harbor," for example, could consider the various aspects of incumbent carriers' current telecommunications services (including DSL and ATM or Frame Relay) conditions and requirements, the operations of their OSS, and the rates charged. A "safe harbor" approach would enable the ISPs to resolve issues of access in a productive and efficient fashion, and yet also allow the incumbent LECs to operate with ISPs in a more constructive manner, with less liability exposure and related litigation expense.

Finally, the Commission should adopt a schedule of penalties that are fair but escalating, in order that incumbent wireline carriers are effectively deterred from engaging in rule violations. As Chairman Powell has noted, today, some carriers have, in some cases, merely viewed FCC fines as a "cost of doing business."[109] An effective penalty system can ensure that the carriers view self-enforcement and compliance to be in their best business interest. To do so, the fines must be *specific*, which will permit the incumbent LECs to engage in appropriate planning and avoidance. The fines must also be *automatic*, to deter any thought that the Commission can be "talked down," and so that excuses of internal remedial action or oversight are deemed irrelevant and pro-active self-enforcement is encouraged. And, finally, the fines must be *escalating* for carriers found to have engaged in multiple rule violations in a given period (i.e., two years) in order that more pressure is brought to bear on a carrier's "bottom line."

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[109] *See, e.g., In the Matter of SBC Communications Inc.*, Order on Review, File No. EB-00-IH-0326a, FCC 02-61, at ¶ 20 (rel. February 25, 2002) (Consistent with the forfeiture policies, the Enforcement Bureau appropriately chose a

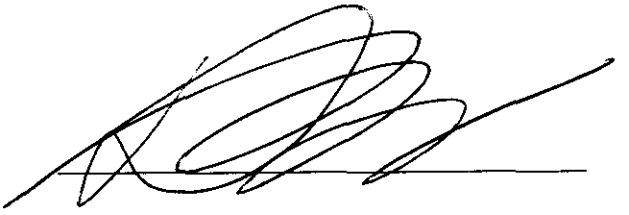
These proposals should not be viewed as punishment of the carriers, but rather as a useful tool and strategy to provide sufficient and powerful incentive for carriers to abide by their common carrier obligations and serve the public interest.

larger fine for a large and profitable company such as SBC so that SBC did not perceive the consequences of rule violation merely as a cost of doing business).

CONCLUSION

As set forth herein, the Commission should reaffirm that broadband Internet access services are information services, that wireline broadband transmission services provided to ISPs have been properly treated as telecommunications services, and that wireline carrier transmission services should continue to be made available to ISPs on a just, reasonable and non-discriminatory basis.

Respectfully submitted,



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